

ARTICLES

INTRODUCTION:

CONSTRAINT, AUTHORITY, AND THE RULE OF LAW IN A FEDERAL CIRCUIT COURT OF APPEALS

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One hundred and twenty-five years ago, during the little-remembered presidency of Benjamin Harrison, Congress put in place one of the building blocks of our modern legal system. The Evarts Act, signed into law in 1891, created a new Article III federal court for the first time since the ill-fated and short-lived Midnight Judges Act of 1801.¹ Even more strikingly, the Evarts Act established for the first time in American history a federal court designed almost exclusively to sit as an intermediate appellate court in between the federal trial courts and the U.S. Supreme Court.² To be sure, an older set of federal circuit courts established in the Judiciary Act of 1789 had possessed some appellate jurisdiction to hear appeals from the district courts. But the old circuit courts had been awkward hybrids, combining trial and appellate functions; they would be abolished entirely in 1911.³ Congress created the new Evarts Act appellate courts to relieve pressure on the Supreme Court's growing workload.⁴ Many in Congress also aimed to create a less arbitrary system of appeals for litigants in the federal trial courts.⁵

These twin goals of reducing the Supreme Court's workload and establishing a meaningful right of appeal produced a set of circuit courts of

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1. See Circuit Court of Appeals Act, ch. 517, 26 Stat. 826 (1891).

2. See Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 851 & n.39 (1984).

3. See FED. BAR COUNCIL, SECOND CIRCUIT REDBOOK 2009–2010, at 5 (Jeanette Redmond ed., 2009); JEFFREY MORRIS, FEDERAL JUSTICE IN THE SECOND CIRCUIT 93 (1987); see also Judicial Code of 1911, ch. 231, 36 Stat. 1087 (1911) (abolishing the old circuit courts).

4. FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUSTICE SYSTEM 95–102 (Transaction Publishers 2007) (1928).

5. See Resnik, *supra* note 2, at 860–62.

appeals with a distinctively constrained new role. On the one hand, Congress authorized them to hear appeals from the federal district courts and old circuit courts, both of which had been stripped of their appellate jurisdiction.⁶ On the other hand, the Evarts Act subordinated them to a Supreme Court, to which the Act also gave new discretionary authority over its own docket.⁷

This, then, is the fate of intermediate Article III courts in our current federal system. The courts of appeals are squeezed from both sides. The district judges and juries, over whom the circuit courts of appeals ostensibly sit, have vast discretion to decide questions of fact that courts of appeals have relatively little power to review.⁸ Reasonable, even if highly contestable, factual determinations are typically secure from appellate reversal.⁹ And although the courts of appeals apply *de novo* review on questions of law decided by the federal district courts,¹⁰ they are themselves subject to *de novo* review in the Supreme Court.

The Supreme Court is increasingly unable or unwilling to grant certiorari in a sufficient number of cases to review anything more than a fraction of the cases decided by the courts of appeals.¹¹ But in high-stakes questions, the Supreme Court can and does regularly step in and exercise its authority to decide the law.¹² Even when the Court agrees with a result reached below, its new rationale can often abandon, sometimes almost entirely, the theory advanced by the court of appeals.¹³ It is no wonder that appellate judges sometimes feel caught betwixt and between. Judge Bruce M. Selya of the U.S. Court of Appeals for the First Circuit put it plainly when he wrote, “the circuit courts, are, literally and figuratively, caught in the middle.”¹⁴

The constraints of deference to district courts and agencies on matters of fact matter greatly; in the mine-run of cases, they may be the most significant factor in limiting the courts of appeals’ power. But such constraints are not nearly as salient as the Supreme Court’s reviewing

6. See Circuit Court of Appeals Act, ch. 17, 26 Stat. at 827.

7. See *id.* at 828.

8. See FED. R. CIV. P. 52(a)(6); see also *Diesel Props S.r.l. v. Greystone Bus. Credit II LLC*, 631 F.3d 42, 52 (2d Cir. 2011) (ruling that findings of fact must not be set aside unless clearly erroneous).

9. In the modern era, the courts of appeals apply a similar deference to agency fact-finding. See, e.g., *Selian v. Astruc*, 708 F.3d 409, 417 (2d Cir. 2013). They have obligations of deference to agencies on the interpretation of ambiguous statutory text. See *New York v. Fed. Energy Regulatory Comm’n*, 783 F.3d 946, 954 (2d Cir. 2015).

10. See, e.g., *Rai v. WB Imico Lexington Fee, LLC*, 802 F.3d 353, 358 (2d Cir. 2015).

11. Richard A. Posner, *The Supreme Court, 2004 Term: Foreword: A Political Court*, 119 HARV. L. REV. 31, 66–67 (2005).

12. See, e.g., *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014), *rev’g* *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013).

13. See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), *aff’g* *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

14. Bruce M. Selya, *Publish and Perish: The Fate of the Federal Appeals Judge in the Information Age*, 55 OHIO ST. L.J. 405, 406 (1994).

authority on questions of law. The most glaring constraints come from on high, not from below.

Consider what has happened when the U.S. Court of Appeals for the Second Circuit gets too far ahead of its time. In 1935, a Second Circuit panel recognized the coming importance of deference to the New Deal Congress and agencies it created. In an opinion by later-disgraced Judge Martin Manton, and joined by Judge Learned Hand and Judge Harrie B. Chase, the court upheld the National Industrial Recovery Act (NIRA) in *United States v. A.L.A. Schechter Poultry Corp.*¹⁵ Later that year, the Supreme Court famously reversed.¹⁶ Chief Justice Charles Evans Hughes, writing for a divided Court, firmly asserted that “[i]t is not the province of the Court to consider the economic advantages or disadvantages of such a centralized system” and struck down NIRA on the basis of soon-to-be outdated distinctions between direct and indirect effects in interstate commerce.¹⁷ Lawyers today are readily familiar with the rest of the story. Within a few short years the Supreme Court abandoned its efforts to limit such New Deal programs.¹⁸ It upheld the Wagner Labor Relations Act¹⁹ and recognized vast congressional authority of economic regulation.²⁰ But few remember the role of the Second Circuit in the New Deal story. Courts of appeals that get ahead of the Supreme Court risk reversal from on high; even when they turn out to be right in the fullness of time, they often do not get the credit.

Sometimes the courts of appeals can be whipsawed from below and above. In the landmark administrative law case *NLRB v. Universal Camera Corp.*,²¹ even the great Learned Hand felt impinged by constraints when he upheld a National Labor Relations Board (NLRB) determination that Universal Camera Corporation had illegally fired an employee because of his testimony at an NLRB hearing. Judge Hand felt constrained to accept the findings of the NLRB, even though it had rejected its own examiner’s findings of fact to the contrary. The Supreme Court, however, reversed 7–2.²² Writing for the Court, Justice Felix Frankfurter acknowledged that he

15. 76 F.2d 617 (2d Cir. 1935).

16. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

17. *Id.* at 549. Some have noted similar formal distinctions creeping back into the law of the Commerce Clause in the past twenty years. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2586–91 (2012) (Roberts, C.J.); see also *id.* at 2646–48 (Scalia, Kennedy, Thomas, Alito, JJ., dissenting); *United States v. Morrison*, 529 U.S. 598 (2000); *Lopez v. United States*, 514 U.S. 549 (1995); Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1149 (2000) (describing *Lopez* as having “revived slumbering restraints on the commerce power”); Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199, 1202 (2003) (describing *Lopez* and *Morrison* as having “revived a skeptical form of rigorous judicial scrutiny”).

18. See BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* (1998); WILLIAM LEUCHTENBERG, *THE SUPREME COURT REBORN* (1996).

19. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

20. *Wickard v. Filburn*, 317 U.S. 111 (1942).

21. 179 F.2d 749 (2d Cir. 1950).

22. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

held Judge Hand in the greatest respect but ruled nonetheless that the record as a whole, including the examiner's findings, could not be said to reasonably support the NLRB's determinations.²³ Learned Hand would later quip that Justice Frankfurter had "singd my Fanny."²⁴ With his characteristic flair for the epigrammatical, Hand conveyed the experience of being overturned by the Supreme Court as few judges have since—at least in public.

And yet, for all the constraints, no one can doubt that the courts of appeals have found ways to exercise great authority. The Court of Appeals for the Second Circuit has been chief among them. Given how few cases the Supreme Court elects to take each year, over 99 percent of federal courts of appeals decisions are effectively final.²⁵ Similarly, the doctrine on the appellate review of findings of fact has sometimes seemed to be a convenient way for judges to reach outcomes they prefer. "Calling a judge's legal conclusion a finding of fact," wrote Judge Henry Friendly in a 1964 dissent, "is an all too easy way for appellate judges to obscure or even avoid legal issues when the result of the trial suits them."²⁶ Constraints, it seems, can become tools in themselves.

Indeed, the Second Circuit has been responsible for remarkable doctrinal innovation given the constraints under which it operates. The articles in this issue show as much. Kenneth A. Plevan writes that there is "arguably no more prolific citation in patent litigation" than the *Georgia-Pacific* factors laid out by Judge Wilfred Feinberg in 1971.²⁷ Floyd Abrams draws our attention to *United States v. One Book Entitled Ulysses by James Joyce*,²⁸ in which Learned Hand's cousin, Judge Augustus Hand, took the occasion of the United States's seizure of the great Irish author's novel to fundamentally liberalize the Victorian-era test for obscenity.²⁹ Consider also the law of white collar crime. Robert J. Anello and Miriam L. Glaser assert that "the Second Circuit's *Kovel* decision changed the way modern attorneys practice law" by extending the attorney-client privilege to communications between an attorney and a professional service provider.³⁰ David Raskin says that Learned Hand's opinion in *United States v. Heine*,³¹ "can fairly be said to have helped to shape the system of judicial review that governs American counterintelligence efforts to this day"; three decades later, the case was cited by one of the architects of the Foreign Intelligence

23. See *id.* at 497.

24. MORRIS, *supra* note 3, at 151.

25. Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 391 (2007).

26. Ruby v. Am. Airlines, Inc., 329 F.2d 11, 23 (2d Cir. 1964) (Friendly, J., dissenting).

27. Kenneth A. Plevan, *The Second Circuit and the Development of Intellectual Property Law: The First 125 Years*, 85 FORDHAM L. REV. 143, 180 (2016) (citing *Ga.-Pac. Corp. v. U.S. Plywood-Champion Papers Inc.*, 446 F.2d 295 (2d Cir. 1971)).

28. 72 F.2d 705 (2d Cir. 1934).

29. Floyd Abrams, *Free Speech and Civil Liberties in the Second Circuit*, 85 FORDHAM L. REV. 11, 15–18 (2016).

30. Robert J. Anello & Miriam L. Glaser, *White Collar Crime*, 85 FORDHAM L. REV. 39, 68 (2016) (discussing *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961)).

31. 151 F.2d 813 (2d Cir. 1945).

Surveillance Court in testimony before Congress.³² Karen Patton Seymour notes that although it “may not have been apparent at the time,” the Second Circuit’s groundbreaking 1951 holding in *Fischman v. Raytheon Manufacturing Co.*³³ that there was a private right of action for fraud under the federal securities laws ultimately proved to be “one of the most significant Second Circuit rulings on securities regulation in history.”³⁴ It is no wonder that the Supreme Court has called the Second Circuit the “Mother Court” of securities law.³⁵

Saul P. Morgenstern, Jennifer B. Patterson, and Terri A. Mazur remind us that in the antitrust area, the Supreme Court certified a case *down* to the Second Circuit when conflicts of interest made it impossible for the Supreme Court to assemble a quorum of six Justices to decide the case.³⁶ In *United States v. Aluminum Co. of America*,³⁷ better known as the “*Alcoa*” case, Learned Hand crafted an opinion that, as Morgenstern and his colleagues note, “has been broadly cited by monopolization decisions issued throughout the country over many decades.”³⁸

How, one wants to know, is this record of accomplishment possible? How, given the radical constraints on the courts of appeals, can a circuit court operate as an effective doctrinal innovator and leave its mark on vastly important areas of doctrine?

In substantial part, the answer seems to reside in the respect the Supreme Court and the courts of appeals in other circuits have held for the Second Circuit. That was why the Supreme Court sent the *Alcoa* case to the Second Circuit seventy-one years ago. It is why the Second Circuit’s affirmance rate in the Supreme Court in its first century was over 50 percent (though just barely).³⁹ Seymour reports that the Second Circuit’s reputation is so great around the world that emerging nations have found it preferable to waive “sovereign immunity and consent[] to the jurisdiction of the Second

32. David Raskin, *Threats Against America: The Second Circuit as Arbiter of National Security Law*, 85 *FORDHAM L. REV.* 183, 186 (2016).

33. 188 F.2d 783 (2d Cir. 1951).

34. Karen Patton Seymour, *Securities and Financial Regulation in the Second Circuit*, 85 *FORDHAM L. REV.* 225, 229 (2016).

35. *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 275–76 (2010) (Stevens, J., concurring in judgment) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975) (Blackmun, J., dissenting)).

36. *United States v. Aluminum Co. of Am.*, 322 U.S. 716 (1944) (“In this case there is wanting a quorum of six Justices qualified to hear it. The cause is accordingly certified and transferred to the United States Circuit Court of Appeals for the Second Circuit . . .” (citation omitted)).

37. 148 F.2d 416 (2d Cir. 1945).

38. Saul P. Morgenstern, Jennifer B. Patterson & Terri A. Mazur, *Antitrust Jurisprudence in the Second Circuit*, 85 *FORDHAM L. REV.* 111, 115 (2016).

39. As Judge Miner reports: “The Circuit’s 100 year ‘batting average’ has not been too shabby either—519 affirmed, 500 reversed, and 22 affirmed in part and reversed in part.” Roger J. Miner, *One Hundred Years of Influence on National Jurisprudence: Second Circuit Court of Appeals Decisions Review by the United States Supreme Court*, in *UNITED STATES COURTS IN THE SECOND CIRCUIT: A COLLECTION OF HISTORY LECTURES DELIVERED BY JUDGES OF THE SECOND CIRCUIT* 138, 144 (Fed. Bar Council Found. ed., 1992).

Circuit and trial courts in New York City.”⁴⁰ Justice Thurgood Marshall—albeit himself an alumnus of the Second Circuit, and thus perhaps not an entirely objective observer—remarked in 1991 that the circuit had “weathered tremendous change in its first century” and yet nonetheless retained “its reputation both for preeminent quality and remarkable efficiency.”⁴¹

Of course, citing widespread respect for the Second Circuit as an explanation for its influence merely begs the question: What explains that respect?

I like to think that the source of the Second Circuit’s influence is not, in the end, something that its judges accomplished *despite* the constraints under which they operate, but something they accomplished *in virtue of* those constraints. After all, the constraints under which the courts of appeals function embody the rule of law in our constitutional order. As the Supreme Court’s docket has shrunk,⁴² and as it has gained nearly complete control over its docket,⁴³ it has slowly ceased to act as a traditional court resolving disputes. Instead, it has tended more and more to be what a number of observers have called a kind of “superlegislature,” intervening not to resolve disputes but to decide matters of great policy import.⁴⁴

By contrast, circuit courts of appeals like the Second Circuit function as highly constrained forums of decision-making authority, rooting their legitimacy in the resolution of the disputes before them. In doing so, they tap deeply into the basic logic of the common law tradition.

The late jurist Ronald Dworkin, who served as a clerk on the Second Circuit for Learned Hand before embarking on his academic career, captured one dimension of this tradition of law and constraint when he said that law, understood properly, is “the best it can be.”⁴⁵ Dworkin observed that lawyers do not typically urge judges that the law is one way but should be another—that the rule is X but should be Y. Instead, we talk about the law in a fashion that draws on our ideas about what the law ought to be. We insist that the law is in fact already what it should be—at least we do so if the argument is plausible. We do so if we can. And that is the key constraint: *if we can*. We make the law the best it can be. For law is always highly constrained. It is not merely what we hope or want it to become. It is what it is. It is the best it can be.

40. Seymour, *supra* note 34, at 256 (citing W. Mark C. Weidemaier, *Sovereign Immunity and Sovereign Debt*, 2014 U. ILL. L. REV. 67, 69, 73–88).

41. Thurgood Marshall, *The Centennial Celebration of the Evarts Act and the United States Court of Appeals for the Second Circuit: Remarks*, 46 REC. ASS’N B. CITY N.Y. 480, 484 (1991).

42. Posner, *supra* note 11, at 67.

43. See Judiciary Act of 1925, ch. 229, 43 Stat. 936.

44. Posner, *supra* note 11, at 39–55; see also Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 590 (2009); Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1733 (2000).

45. RONALD DWORKIN, *LAW’S EMPIRE* 53 (1986).

Dworkin's pithy phrase captures what the federal courts of appeals do: they aim to make a highly constrained practice the best it can be. That is the essence of judicial decision making in a rule of law culture. Inevitably, constraint entails a sacrifice of power. But it should not surprise us if, over time, a court exercising interstitial authority should come to have outsized influence. This kind of authority is the heartbeat of the rule of law. And for 125 years, it has been the heartbeat of the Second Circuit.

